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IN THE  
**Supreme Court of the United States**

DECEMBER TERM, 1978

**No. 78—354**

STATE OF NORTH CAROLINA,

*Petitioner,*

v.

WILLIE THOMAS BUTLER,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF NORTH CAROLINA

**BRIEF FOR THE PETITIONER**

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**BRIEF FOR PETITIONER**

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**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

Amendment V of the Constitution of the United States provides:

"No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . ."

Amendment XIV, Section 1 of the Constitution of the United States provides:

"...[N] or shall any State deprive any person of life, liberty, or property, without due process of law..."

## JURISDICTION

From a final judgment of the Supreme Court of North Carolina entered in this case on June 6, 1978 [reported at 295 N.C. 250, 244 S.E. 2d 410 (1978)] ordering for the defendant a new trial, the State of North Carolina petitioned this Court on August 30, 1978 for Writ of Certiorari, pursuant to Rule 22(1) invoking this Court's jurisdiction under 28 U.S.C. §1257(3). Such petition for Certiorari was allowed by this Court on 11 December 1978.

## QUESTION PRESENTED<sup>1</sup>

INTERPRETING THIS COURT'S DECISION IN *MIRANDA v. ARIZONA*, 384 U.S. 436 (1966), IN

<sup>1</sup>The *Question Presented* in the State of North Carolina's Petition for Certiorari, which has been simplified and generalized above for the purposes of this brief, was as follows:

### "QUESTION PRESENTED

Interpreting this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), after being fully advised of his rights and acknowledging an understanding of such rights, in the absence of a specific affirmative oral or written waiver of counsel by a suspect under arrest and being questioned, does federal law prohibit a state trial court from finding an *implied* waiver of counsel from the

THE ABSENCE OF AN EXPRESS ORAL OR EXPRESS WRITTEN WAIVER OF RIGHT TO COUNSEL PRIOR TO QUESTIONING, DOES *MIRANDA* ALLOW A FINDING OF AN *IMPLIED* WAIVER OF RIGHT TO COUNSEL FROM THE TOTALITY OF THE SURROUNDING FACTS AND CIRCUMSTANCES OF THE CASE WHERE THE SUSPECT HAS BEEN FULLY ADVISED OF HIS CONSTITUTIONAL RIGHTS BEFORE MAKING VOLUNTARY INCRIMINATING STATEMENTS IN RESPONSE TO QUESTIONING?

## STATEMENT OF THE CASE

Willie Thomas Butler was convicted upon trial by jury in Wayne County Superior Court, North Carolina for the offenses of Kidnapping [N.C. Gen. Stat. §14-39], Armed Robbery [N.C. Gen. Stat. §14-87], and Felonious Assault [N.C. Gen. Stat. §14-32(a)]. From a judgment

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surrounding facts and circumstances of the case, under the Fifth Amendment, as applicable to the State through the Fourteenth Amendment, thereby prohibiting the use by the prosecution as evidence in a state court an incriminating statement by the criminal defendant made to an agent of the FBI when arrested in another state on a fugitive warrant after the defendant had been fully advised of his constitutional rights as required by *Miranda* and then had replied to such advising FBI Agent that he understood his rights, that he "didn't want to sign anything" and that he would "talk to you but I am not signing any form", when defendant thereafter spoke freely and voluntarily in answering the agent's questions without ever requesting the presence of counsel?"

imposing two concurrent life sentences and a five year sentence of imprisonment which also ran concurrently, the defendant appealed to the North Carolina Supreme Court. That Court reversed such convictions and ordered a new trial finding defendant's confession, which was admitted into evidence against him, did not comply with the North Carolina Supreme Court's interpretation of *Miranda v. Arizona, supra*.

The State's evidence tended to show that Ralph Burlingame was closing a Kayo service station about 11:00 p.m. on 28 December 1976 in Wayne County, North Carolina, when two black males came to the door to buy beer. The two left upon being informed that the station was closed. Burlingame thereafter locked up and started to his car, but was accosted by the same two males with pistols drawn. He was forced into his vehicle and ordered to drive away at gunpoint. He was informed that "it was a holdup" and that he would be killed at the end of the ride because he was white. Upon hearing this, Burlingame opened the door and jumped from the moving vehicle. As he fled, he was shot in the back, the bullet penetrating his spinal cord and leaving his legs paralyzed. He "played dead" when the assailants stopped the car and returned to take \$30.00 from his wallet and to shoot him twice more. The police found Burlingame lying in the road shortly afterwards. Two bullets, each of a different caliber, were removed from his body at the hospital. He survived, but remained paralyzed. He identified defendant's photograph along with that of the accomplice in a twelve-photograph

display a short time later. In court he was positive that the defendant was the man who shot him. [R. pp. 48 - 69]<sup>2</sup>

After these offenses, defendant fled the State and on May 2, 1977 he was arrested in New York as a fugitive by FBI Agent David C. Martinez. Defendant was given the *Miranda* warnings by Agent Martinez at the time of his arrest and again back at the Agent's office, where Butler was asked to execute an "Advice of Rights Form". After reading the form he acknowledged that he understood what it said but he indicated that he didn't want to sign the form and he didn't want to sign anything. In response to the Agent's subsequent question of whether or not he would be willing to talk to them, defendant stated: "I will talk to you but I am not signing any form." Defendant thereafter made no express statement that he did not want a lawyer present, but he never requested a lawyer either. [R. pp. 6-19] His subsequent incriminating statement to the FBI Agents was held admissible by the trial judge who found that such statement was freely and voluntarily made after a proper *Miranda* warning and the defendant had "effectively waived his rights, including the right to have an attorney present during the questioning by his indication that he was willing to answer questions," since he had read the rights form together with the

<sup>2</sup>The reference to "R.pp." throughout this brief refers to pages from the official certified record of this case on appeal before the North Carolina Supreme Court. The above summarized facts are located from pages 48 through 69 of the record.

waiver of rights, acknowledged his understanding of it, and chose to speak thereafter. This was assigned as error and it was this assigned error for which the North Carolina Supreme Court reversed defendant's convictions, ordering a new trial.<sup>3</sup> The North Carolina Supreme Court interprets *Miranda v. Arizona, supra*, as requiring either an express written or an express oral waiver of counsel. Citing its own prior opinions, *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971) and *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977) the Court held that a correct interpretation of *Miranda* requires that "waiver of the right to counsel during interrogation will not be recognized unless such waiver is 'specifically made' after the *Miranda* warnings have been given."<sup>4</sup> Thus, inclusion of defendant's incriminating statement in which he admitted drinking with a black male named Elmer Lee on 28 December 1976, agreeing with Lee to rob the Kayo gas station, accompanying Lee, who was armed, to the station, and participating in the robbery at the time Burlingame was shot, was prejudicial error requiring a new trial the Court held.

<sup>3</sup>The opinion of the North Carolina Supreme Court reported in 295 N.C. 250, 244 S.E. 2d 410 (1978) is reproduced in its entirety as APPENDIX A in the State of North Carolina's Petition for Certiorari filed in this case in the United States Supreme Court on 30 August 1978.

<sup>4</sup>*Butler, supra*, 295 N.C. at 254, citing *Miranda v. Arizona, supra*, 384 U.S. at 470.

## MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The federal question presented herein was originally raised by Butler's timely objection at trial to the admission of any statement which he made to FBI Agent Martinez at the time of his arrest and his interrogation. Upon such timely objection, the trial court heard evidence on *voir dire* out of the presence of the jury and thereafter made the following findings of fact and conclusions of law:

"... the Court makes the following findings of fact:

That on or about May 3, 1977 Agent Martinez together with other agents went to a fifth floor apartment building in the Bronx, New York, and knocked on a door and gained entrance to the apartment; that the defendant, Butler, was present in the apartment and was placed under arrest at that time for unlawful flight to avoid prosecution, the agent having information at that time that the defendant had allegedly committed an offense of armed robbery in the State of North Carolina; that the defendant was advised of his rights orally at the time of the initial arrest in New York City, and was advised that he had the right to remain silent; that anything he said could be used against him in court, and that he had the right to talk to a lawyer for advice before any

questions were asked but if he could not afford an attorney that one would be appointed for him before any questioning; that if he decided to answer questions without a lawyer present that he could stop at any time and would have the right to have an attorney appointed for him at that time.

Having been warned of his rights as required by the *Miranda* decision, the defendant made no statements nor was he asked any questions at the time of the initial arrest of the defendant; that the defendant was subsequently transported by Agent Martinez to the New Rochelle, New York office of the FBI where the defendant was taken to an interrogation room where he was presented with State's Exhibit 1 on *voir dire*, the paper writing entitled 'Your Rights'; that it had been previously determined by Agent Martinez that the defendant had an eleventh grade education and that he could read and write; that State's Exhibit No. 1 on *voir dire* indicates the rights as shown thereon as follows:

'Before we ask you any questions you must understand your rights. You have the right to remain silent; anything you say can be used against you in Court; you have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during the questioning;

if you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.'

The form also provides in the middle thereof the designation 'Waiver of Rights'. The Waiver reads:

'I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.'

Having presented this form entitled 'Advice of Rights', and subdivision 'Your Rights' and 'Waiver of Rights', the defendant proceeded to read the form and upon conclusion of his reading the form indicated that he did not desire to sign the form but that he would make a statement to the agent which he proceeded to do as appears of record.

Based upon the foregoing, the court is of the opinion and concludes that the statement

made by the defendant, William Thomas Butler, to Agent David C. Martinez, was made freely and voluntarily to said agent after having been advised of his rights as required by the *Miranda* ruling, including his right to an attorney being present at the time of the inquiry and that the defendant, Butler, understood his right to have an attorney present during the questioning by his indication that he was willing to answer questions, having read the rights form together with the Waiver of Rights; that the statement made by William Thomas Butler following the agent's advising him of his rights was voluntarily made at a time when the defendant understood his rights and that no promises or offers of leniency nor threats or pressure or coercion of any kind has been exerted against the defendant, and that any statement or confession so made was freely and voluntarily given;

Based upon the foregoing, the court is of the opinion and rules as a matter of law that any statement made by William Thomas Butler in the presence of Agent David C. Martinez, after having been advised of his rights, may be received in evidence in the trial of this action.

#### EXCEPTION NO. 1"

[R. pp. 19-22]

Butler's exception to this ruling was duly noted, recorded and raised when he appealed his conviction to the North Carolina Supreme Court asserting as error the admission of his confession in violation of his Federal constitutional rights. The North Carolina Supreme Court found the admission of this confession to be error and reversed, holding that federal law (*Miranda v. Arizona*) requires the prosecution to show that an express oral or written waiver of right to counsel was specifically made by a defendant before his incriminating statement can be used as evidence against him and that no waiver can be implied in the absence of such express specific waiver.

The Federal Question presented herein has thus been properly raised and appropriately preserved at all stages of this case.

#### SUMMARY OF ARGUMENT

The *Miranda* decision enunciated a series of specific protective procedural safeguards necessary to secure and insure a criminal suspect's Fifth Amendment privilege against compulsory self-incrimination during custodial interrogation. These procedural safeguards were not themselves rights protected by the Constitution, but prophylactic measures to ensure and guarantee Constitutional rights. The decision adopted an exclusionary rule as its prime sanction in the event that such prophylactic measures were not followed. The *Miranda* Court with clarity described these measures for police to follow as "concrete constitutional guidelines" in precisely

delineating the rights to which any suspect is entitled during custodial interrogation and the required warnings to be given. After the police officer has borne *Miranda's* burden of properly informing the suspect of his rights, the language of the *Miranda* Court was less than precise in what would or could thereafter constitute a waiver of such rights by the suspect. Certain portions of the opinion<sup>5</sup> lead to the conclusion

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<sup>5</sup>A portion of the *Miranda* opinion indicated:

"Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. *If however, he indicates in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." [384 U.S. at 444 and 445 (emphasis added)]

. . . .

"Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner* at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." [384 U.S. at 473 and 474 (emphasis added)]

. . . .

"Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . .

that a properly warned suspect who chooses to speak voluntarily in response to questioning, who has not exercised his right to silence or counsel by indicating *in any manner* that he chooses to exercise such rights, may by his actions waive those rights, although he never does so by specific express oral or written waiver. This is the interpretation of *Miranda* which has been consistently adopted by the Federal Circuit Courts of Appeal in these United States.<sup>6</sup>

This Court's subsequent decisions have indicated that the prophylactic guidelines of *Miranda* were not intended to create a constitutional straightjacket to thwart police and to be used as a shield protecting killers, robbers and rapists from full disclosure of the truth to the triers of fact, but instead were intended to provide practical reinforcement of the Fifth Amendment right against self-incrimination, and protection against police improprieties of coercion,

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. . . .

Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." [384 U.S. at 477 and 478]

<sup>6</sup>See cases cited in Argument II, *Infra*, of this brief indicating that the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 9th, 10th and District of Columbia Federal Circuit Courts of Appeal recognize the doctrine of implied waiver of *Miranda* rights.

brutality, physical and psychological pressure, and overbearing in obtaining confessions.<sup>7</sup> This Court has indicated that it will not be bound by literal interpretations of some portions of the *Miranda* Court's opinion in such a way as to lead to an absurd and unintended result, which could "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity..."<sup>8</sup> The Court has determined since *Miranda* that violation of a prophylactic guideline does not necessarily require *per se* exclusion of an otherwise voluntary confession in all cases, so long as the confession was not the product of willful or negligent police conduct amounting to bad faith and unfair police activity.<sup>9</sup>

This Court has, since *Miranda*, declined to extend or expand its requirements and has evidenced an overall effort to "contain *Miranda* to the express terms and logic of the original opinion."<sup>10</sup>

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<sup>7</sup>*Michigan v. Tucker*, 417 U.S. 433, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974).

<sup>8</sup>*Michigan v. Mosley*, 423 U.S. 96, 102, 46 L. Ed. 2d 313, 320, 96 S. Ct. 321, \_\_\_\_ (1975).

<sup>9</sup>*Michigan v. Tucker*, *supra*; *Michigan v. Mosley*, *supra*.

<sup>10</sup>*Fare v. Michael C.*, \_\_\_\_ U.S. \_\_\_\_, 58 L. Ed. 2d 19, 24, 99 S. Ct. 3, 5, (1978).

The State of North Carolina respectfully submits that *Miranda v. Arizona*, by its language and principles as explained by the *Miranda* Court in its opinion and as explained and interpreted by this Court in subsequent opinions, establishes no mandatory requirement that a properly warned suspect make a specific express oral or written waiver of his rights before custodial interrogation can commence, as a prerequisite to the admissibility of any voluntary confession. If the totality of the circumstances show that the suspect was properly warned of his rights, that he was subjected to no undue police pressure or unfair police activity, that he responded to questioning without objection or expression of a desire to remain silent or to have counsel present, and that his choice to respond was a product of his own volition, then "waiver is implicit in such circumstances, for it is quite inconsistent with an assertion of a known right."<sup>11</sup> Such an implied waiver would violate neither the mandate nor the purpose of *Miranda*.

## ARGUMENT I

### INTRODUCTION

The North Carolina Supreme Court has consistently interpreted the requirements of *Miranda v. Arizona*, *supra*, to include a mandatory showing of a

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<sup>11</sup>*Blackmon v. Blackledge*, 541 F. 2d 1070, 1073 (4th Cir. 1976).

specific express affirmative oral or written waiver of counsel by a suspect prior to the admissibility of any voluntary statements by such suspect made during in-custody interrogation. The opinions of that Court in *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971) *appeal from retrial* at 284 N.C. 1, 199 S.E. 2d 431 (1973); *State v. Butler*, *supra*; *State v. Connley*, 295 N.C. 327, \_\_\_\_ S.E. 2d \_\_\_\_ (1978) [State's Petition for Certiorari filed on 6 October 1978 is now pending before this Court]<sup>12</sup> based solely on that Court's interpretation of federal law, leave no question but that the court will apply a *per se* rule of exclusion in the absence of a specific express waiver, irrespective of the totality of the surrounding circumstances, in determining effective waiver of counsel.<sup>13</sup> The

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<sup>12</sup>The State of North Carolina petitioned the United States Supreme Court on 6 October 1978 (No. 78-582) for review of the North Carolina Supreme Court's reversal of a first degree murder conviction of Ruben Sonny Connley for the killing of a Virginia State Highway Patrol Trooper. Connley's response to *Miranda* warnings given by an FBI Agent indicated an acknowledgment and an understanding of his rights and also a willingness to talk, but a refusal to sign the waiver form. The facts in question presented in *Connley* are almost identical to that presented in *Butler*. At the time of the preparation of this brief, there had been no ruling by this Court on that petition.

<sup>13</sup>In *State v. Silhan*, 295 N.C. 636, \_\_\_\_ S.E. 2d \_\_\_\_ (1978), the North Carolina Supreme Court's most recent application of a *Miranda* waiver, the Court excluded a confession wherein the suspect allegedly verbally waived his rights but indicated on the written waiver form that he *did* desire to have a lawyer present.

*Blackmon* case emphasizes that Court's interpretation of this aspect of federal law and how such interpretation is in conflict with the Federal Circuit Court of Appeals of this jurisdiction, and the Federal Circuit Courts of Appeal in all jurisdictions which have ruled upon this issue.

Defendant Johnny James Blackmon was convicted during the March 29, 1971 Term of the Superior Court of Stanly County, North Carolina for the offense of first degree murder. The jury making no recommendation for life imprisonment, the death penalty was imposed and defendant appealed. One of the errors assigned on appeal was admission into evidence of defendant's confession. The trial court on *voir dire* had found that the defendant at the time of his arrest was fully warned of his constitutional rights under *Miranda*, that defendant "did not request...the presence of an attorney," that he stated "he understood his rights," and that incriminating statements made thereafter were admissible. The North Carolina Supreme Court ruled it was error for the trial judge to allow into evidence such statement because there was no showing as required by federal law, as that Court interpreted *Miranda*, that the defendant had made a specific affirmative oral or written waiver of counsel, rendering the inclusion of

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That ruling is consistent with this Court's decision in *Brewer v. Williams*, 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977). Since the suspect had indicated in some positive manner that he did not waive counsel, his subsequent confession was properly excluded.

such evidence prejudicial error. [*State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971)] On retrial the defendant was again convicted during the 28 August 1972 session of Superior Court in Union County, North Carolina. The confession was again offered and received into evidence. The *voir dire* testimony showed that the incriminating statements which defendant made were made in an interrogation room in the presence of police officers when defendant was confronted by a co-defendant who accused the defendant of having shot the victim. The incriminating statements resulting from an exchange between these two suspects verbally confronting one another were admitted into evidence against Blackmon. When the co-defendant had left the room and the Sheriff asked defendant, "Do you care to make any further statement?", defendant responded, "Well, I'm just going to tell you how it was." His subsequent incriminating narrative was also admitted into evidence. On this second appeal the North Carolina Supreme Court in reviewing this same confession again said, "[t]hese facts, however, are not sufficient to constitute a waiver of counsel. *There is neither evidence nor findings of fact to show that defendant expressly waived his right to counsel, either in writing or orally, within the meaning of Miranda on which our decision in State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971) *is based.*" [*State v. Blackmon*, 284 N.C. 1, 9, 199 S.E. 2d 431, 437 (1973) (Emphasis added)] However, the Court thereafter held the evidence admissible on the theory that such statements were not the result of an interrogation and were more in the nature of volunteered statements.

[*State v. Blackmon*, 284 N.C. at 12] The conviction was affirmed and case remanded for imposition of a life sentence. Blackmon thereafter proceeded by writ of habeas corpus to the Federal District Court for the Western District of North Carolina challenging his conviction through the use of such confession in violation of his federal constitutional rights. The District Court granted the writ, [*Blackmon v. Blackledge*, 396 F. Supp. 296 (W.D.N.C. 1975)], but the Circuit Court of Appeals reversed, finding under the facts as previously described that there had been a compliance with *Miranda* and that Blackmon had waived counsel, stating that after proper warnings, "...a suspect's submission to questioning without objection and without requesting a lawyer is clearly a waiver of his right to counsel. . ." [*Blackmon v. Blackledge*, 541 F.2d 1070, 1073 (4th Cir. 1976)]

These opinions clearly focus the conflict in interpretation of federal law that exists in this jurisdiction.

## ARGUMENT II

IN INTERPRETING AND APPLYING THE *MIRANDA DECISION*, LOWER FEDERAL COURTS HAVE APPLIED A TOTALITY OF CIRCUMSTANCES TEST IN DETERMINING IMPLIED WAIVER OF COUNSEL, REJECTING FURTHER EXTENSION AND EXPANSION OF *MIRANDA*.

A substantial body of case law has developed among the United States Circuit Courts of Appeal

rejecting any extension or expansion of *Miranda*. In *United States v. Ganter*, 436 F. 2d 364 (7th Cir. 1970) the court applied its interpretation of *Miranda* to a case wherein the suspect was arrested for assaulting an FBI agent and fleeing with the agent's gun. After being arrested and having been advised of his *Miranda* rights, the suspect was asked where the gun was located; he replied that the weapon was under a nearby couch, where it was in fact found. Citing *United States v. Montos*, 421 F. 2d 215, (5th Cir. 1970) *cert. den.* 397 U.S. 1022, 25 L. Ed. 2d 532, 90 S. Ct. 1262 (1970) as "an excellent summary of the *Miranda* doctrine as developed to date," the Seventh Circuit held "what we believe to be a salutary rule if police investigations are to have any efficacy whatsoever, namely, that an express statement that the individual does not want a lawyer is not required if it appears that the defendant was effectively advised of his rights and *he then intelligently and understandingly declined to exercise them.*" [*Ganter*, 436 F. 2d at 370 (Emphasis added)]

In *Hughes v. Swenson*, 452 F. 2d 866 (8th Cir. 1971) the Eighth Circuit Court of Appeals was faced with the following issue. "The thrust of appellant's claim is that a valid waiver cannot be effective absent an expressed declaration to that effect. *We are cited to no case which supports appellant's thesis and independent research discloses none.* To the contrary, the Fifth, Seventh, Ninth, and Tenth Circuits have held in effect that if the defendant is effectively advised of his rights and intelligently and understandingly declines to exercise them, the waiver is valid." [*Hughes v. Swenson*,

452 F. 2d at 867 (emphasis added), citing as authority: *United States v. Montos*, 421 F. 2d 215, 224 (5th Cir.), *cert. den.* 397 U.S. 1022, 25 L. Ed. 2d 532, 90 S. Ct. 1262 (1970); *United States v. Ganter*, 436 F. 2d 364, 369-370 (7th Cir. 1970); *United States v. Hilliken*, 436 F. 2d 101, 102-103 (9th Cir. 1970), *cert. den.* 401 U.S. 958, 28 L. Ed. 2d 242, 91 S. Ct. 987 (1971); *Bond v. United States*, 397 F.2d 162, 165 (10th Cir.) *cert. den.* 393 U.S. 1035, 21 L. Ed. 2d 579, 89 S. Ct. 652 (1968)]. Further research indicates that the United States Court of Appeals for the District of Columbia in *United States v. McNeil*, 433 F. 2d 1109 (1969) and *Mitchell v. United States*, 434 F. 2d 483 (D.C. Cir.), *cert. den.* 400 U.S. 867 (1970), had taken a similar position at the time of the *Hughes v. Swenson* decision in the Eighth Circuit. The Third and Fourth Circuit Courts of Appeal had taken this same position at the time of the *Hughes v. Swenson* decision in *United States v. Ruth*, 394 F. 2d 134 (3rd Cir.), *cert. den.*, 393 U.S. 888 (1968), *United States v. Stuckey*, 441 F. 2d 1104 (3rd Cir.), *cert. den.*, 404 U.S. 841 (1971) and *United States v. Thompson*, 417 F. 2d 196 (4th Cir.) *cert. den.*, 396 U.S. 1047 (1970).

Thereafter a number of the remaining Circuit Courts of Appeal followed suit. In *United States v. Moreno-Lopez*, 466 F. 2d 1205 (9th Cir. 1972) the Ninth Circuit remained consistent with its prior *Miranda* interpretation finding that "[a]n express waiver is not required. Rather, courts must look at the circumstances of each case to determine the validity of a waiver of *Miranda* rights." In *United States v. Speaks*, 453 F. 2d 966 (1st Cir. 1972) the First Circuit Court of Appeals

found a valid waiver where the properly warned suspect refused to sign the written waiver, but was willing to talk. In *United States v. Boston*, 508 F.2d 1171 (2nd Cir. 1974) the Second Circuit Court of Appeals refused to adopt a *per se* exclusionary rule where there was no written waiver and the suspect refused to sign a waiver, looking instead to the surrounding circumstances in determining that there was a valid waiver of rights. Citing a number of the aforementioned cases, The Eighth Circuit Court of Appeals took a similar position in *United States v. Marchildon*, 519 F.2d 337 (8th Cir. 1975), consistent with its decision in *Hughes v. Swenson*. In *Blackmon v. Blackledge*, *supra*, the Fourth Circuit Court of Appeals citing the above authorities found a suspect's waiver by implication "in all of the surrounding circumstances, including his knowledge of his rights and his response to questioning without objection or expression of a wish for the presence of a lawyer." The Court went on to find that the suspect "never requested a lawyer or suggested in any way that he did not wish to submit to questioning without the presence of a lawyer. Waiver is implicit in such circumstances, for it is quite inconsistent with an assertion of the known right." [*Blackmon*, 541 F.2d at 1073]

Present research indicates that the Sixth Circuit Court of Appeals is the only Federal Circuit Court which has not yet faced and resolved this issue. All remaining Circuit Courts of Appeal appear to have adopted a *totality of the circumstances test* in determining whether there exists an implied waiver,

where an express waiver is absent. Such has been and continues to be a proper interpretation and application of the *Miranda* decision, precluding any unwarranted expansion or extensions.<sup>14</sup>

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<sup>14</sup>An examination of the opinions of the Supreme Courts and Courts of Appeal of the various States reveals that a number of states have interpreted *Miranda* as allowing an implied waiver of counsel from the totality of the circumstances. The following twenty states appear to recognize *implied waiver*:

ALABAMA—*Sullivan v. State*, Ala.Cr.App. 351 So.2d 659, cert. denied 351 So.2d 665 (1977).

ARIZONA—*State v. Pineda*, 110 Ariz. 342, 519 P.2d 41 (1974); *State ex rel Berger v. Superior Court*, 109 Ariz. 506, 513 P.2d 935 (1973).

CALIFORNIA—*People v. Johnson*, 75 Cal.Rptr. 401, 450 P.2d 865 (reversed on other grounds) (1969); *People v. Sam*, 77 Cal.Rptr. 804, 454 P.2d 700 (1969).

COLORADO—*People v. Weaver*, 179 Colo. 331, 500 P.2d 980 (1972); *Reed v. People*, 171 Colo. 421, 467 P.2d 809 (1970).

DELAWARE—*Aaron v. State*, Del.Supr. 275 A.2d 791 (1971).

FLORIDA—*State v. Craig*, Fla. 237 So.2d 737 (1970).

GEORGIA—*Peek v. State*, 239 Ga. 422, 238 S.E.2d 12 (1977).

ILLINOIS—*People v. Brooks*, 51 Ill.2d 156, 281 N.E.2d 326 (1972).

KANSAS—*State v. Baker*, Kan.App. 580 P.2d 90 (1978).

MAINE—*State v. Hazelton*, Me. 330 A.2d 919 (1975).

MARYLAND—*Miller v. State*, 251 Md. 362, 247 A.2d 530 (1968); *Burton v. State*, 7 Md.App. 671, 256 A.2d 826 (1969).

MASSACHUSETTS—*Commonwealth v. Johnson*, Mass.App. 326 N.E.2d 355 (1975); *Commonwealth v. Murray*, 359 Mass. 541, 269 N.E.2d 641 (1971).

### ARGUMENT III

CERTAIN PORTIONS OF THE *MIRANDA DECISION* LEAD TO THE INTERPRETATION AND CONCLUSION OF THE FEDERAL CIRCUIT COURTS OF APPEAL AND THE OTHER COURTS CITED ABOVE THAT A PROPERLY WARNED CRIMINAL SUSPECT DOES NOT EXERCISE HIS RIGHT TO SILENCE UNDER *MIRANDA* UNLESS HE STANDS MUTE OR OTHERWISE CLEARLY EXPRESSES HIS DESIRE NOT TO SPEAK, AND THAT ANY OTHER CONDUCT MAY IMPLY A WAIVER OF RIGHTS TO SILENCE AND COUNSEL.

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MINNESOTA—*State v. Nelson*, \_\_\_\_ Minn. \_\_\_\_, 257 N.W.2d 356 (1977).

MISSOURI—*State v. Williams*, Mo.Cr.App. 547 S.W.2d 139 (1977); *State v. Alewine*, Mo. 474 S.W.2d 848 (1972); *State v. Burnside*, Mo. 473 S.W.2d 697 (1971).

OKLAHOMA—*Shirley v. State*, Okl.Cr. 520 P.2d 701 (1974).

OREGON—*State v. Davidson*, 252 Ore. 617, 451 P.2d 481 (1969).

PENNSYLVANIA—*Commonwealth v. Cost*, 238 Pa.Superior Ct. 591, 362 A.2d 1027 (1976); *Commonwealth v. Garnett*, 458 Pa. 4, 326 A.2d 335 (1974).

TENNESSEE—*Parks v. State*, Tenn.Cr.App. 543 S.W.2d 855 (1976); *Bowling v. State*, Tenn.Cr.App. 458 S.W.2d 639 (1970).

VIRGINIA—*Land v. Commonwealth*, 211 Va. 223, 176 S.E.2d 586 (1970) (reversed on other grounds).

WASHINGTON—*State v. Young*, 89 Wash.2d 613, 574 P.2d 1171 (1978).

*Miranda* imposes a constitutional duty and burden upon a police officer conducting custodial interrogation to properly inform the suspect of his rights and to honor any right which the suspect chooses to exercise. Although a police officer may not in any manner improperly discourage the exercise of basic constitutional rights by a suspect, such officer is not required or obliged to encourage a suspect to exercise these rights, nor is he expected to exercise a particular right for the suspect. Expecting such of law enforcement personnel would require an abrogation of their function.<sup>15</sup> Although the officer bears *Miranda's*

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<sup>15</sup> \* \* "[I]n this country we have one of the most moralistic criminal law systems that the world has yet produced. It is enforceable only in a sporadic, uneven and discriminatory fashion. The most severe drug laws and the largest number of addicts. Highly restrictive sex laws in a society that can hardly be regarded as dedicated either to monogamy or the missionary position in copulation; and in which sexual stimuli are ubiquitous. In relation to these laws the police have ritual, sacerdotal functions to perform, like a secular priesthood. And they have also to handle our drunks and alcoholics, our snarled and feverish traffic, our vagrants, our treed cats, our parading dignitaries, our gamblers other than us, our burgeoning riots, and in the remainder of their time to protect us from serious crime.

\* \* \* In many of our cities we pay the police less than the garbage collector, overload them with a morally pretentious law, and require them to demonstrate wisdom and skill in excess of that which is expected of any of the established professions. The

burden to *inform* the suspect of his rights, the suspect bears the responsibility in the *exercise* of these rights. The officer may not improperly influence the suspect's decision, but it is the suspect who must by word or act make and demonstrate his choice.

This Court's language in *Miranda* addresses that distinction: "Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner* at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." [384 U.S. at 473-474 (Emphasis added)]

A RATIONAL INTERPRETATION OF THIS LANGUAGE WOULD INDICATE THAT ONCE WARNINGS HAVE BEEN PROPERLY GIVEN AND ACKNOWLEDGED IN THE ABSENCE OF ANY INDICATION THAT THE SUSPECT WISHES TO REMAIN SILENT OR TO CONSULT WITH COUNSEL, THE OFFICER MAY PROPERLY BEGIN TO QUESTION THE SUSPECT UNTIL THE SUSPECT EXERCISES ONE OF THESE RIGHTS OR "INDICATES IN ANY MANNER" THAT HE CHOOSES TO DO SO.

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policeman is expected to be an expert on the law, a psychologist, a strategist, on occasion a midwife, a protector of public safety, a ruthless prosecutor of crime and at the same time a guardian of civil liberty."

L. Hall, Y. Kamisar, W. LaFave, J. Israel, MODERN CRIMINAL PROCEDURE (3rd Edition, 1969) p. 160.

If the suspect chooses to exercise his right to silence, this Court, as indicated in *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976), will rigidly protect that choice and will allow no inference of guilt to be drawn from the suspect's decision not to speak.

If the suspect chooses to exercise his right to counsel, this Court, as indicated in *Brewer v. Williams*, 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977) will require strict adherence to such request and will prohibit any attempt at circumvention.

However, if the properly warned suspect makes the decision to speak, he by his words or actions demonstrates what rights, if any, he chooses to *exercise*. In *United States v. Washington*, 431 U.S. 181, 52 L. Ed. 2d 238, 97 S. Ct. 1814 (1977) this Court, in refusing to hold inadmissible at a federal criminal prosecution the grand jury transcripts of incriminating testimony of a defendant who had chosen to testify before such federal grand jury after proper admonishments regarding his Fifth Amendment rights, indicated that incriminating statements made voluntarily by a properly warned suspect who chose to speak and thus chose not to exercise his right to silence was competent evidence irrespective of whether or not the suspect fully appreciated that the focus of the investigation had crystallized upon him and that any statement he made had potential adverse significance.

The language of *Miranda* is not inconsistent with the concept of implied waiver, nor does the *Miranda* Court's choice of language preclude implied waiver as a viable concept in the application of its decision.

A decision expressly to exercise the right to remain silent or to consult counsel or a decision to expressly waive both rights is not the only alternative presented in the usual custodial interrogation situation. The totality of the circumstances may in some cases reflect an implied exercise of rights, as when the accused simply remains silent. Likewise the totality of the circumstances may reflect an implied waiver as when the accused promptly volunteers an incriminating statement. *The test is not whether the exercise of the waiver is express, but whether it is real, recognizing that the burden of persuasion in establishing waiver rests entirely with the State.*

#### ARGUMENT IV

THE POLICY CONSIDERATIONS UNDERLYING *MIRANDA* AS DISCUSSED BY THIS COURT IN THAT DECISION AND IN ITS SUBSEQUENT DECISIONS SUPPORT A RULE OF LAW WHICH ALLOWS A FINDING OF IMPLIED WAIVER OF COUNSEL FROM THE TOTALITY OF THE CIRCUMSTANCES, BALANCING THE INTERESTS OF SOCIETY AND OF THE SUSPECT.

The landmark *Miranda* decision enunciated a series of specific protective procedural guidelines necessary to secure and insure a criminal suspect's Fifth Amendment privilege against compulsory self-incrimination during custodial interrogation. The historical roots of the Fifth Amendment privilege

against compulsory self-incrimination lay in the Founding Fathers' desire to prohibit *Star Chamber* proceedings and assorted inquisition style brutalities by law enforcement officers who sought to obtain admissions of guilt from a suspect's own lips. This Court indicated that these procedural safeguards were not themselves rights protected by the Constitution, but were prophylactic measures to ensure that a criminal suspect's right against compulsory self-incrimination during a custodial interrogation was protected. Under *Miranda*, the suspect must be apprised of his Fifth Amendment rights and make a voluntary, knowing, and intelligent waiver before his statements can be introduced by the prosecution against him in its case in chief. The Court stated, "The warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant." [384 U.S. at 476] In analyzing whether a waiver of an individual's *Miranda* rights can be implied from the totality of the circumstances immediately preceding the giving of a statement, the policy considerations underlying *Miranda*, as enunciated by the Court in cases following *Miranda*, must be examined.

In *Michigan v. Tucker*, 417 U.S. 433, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974), this Court set forth a two-pronged analysis of *Miranda* rights questions. Mr. Justice Rehnquist, delivering the opinion of the Court, reviewed the historical antecedents of the Fifth Amendment privilege against compulsory self-incrimination. He indicated that the *Miranda* prophylactic guidelines were not intended to create a constitutional straight-jacket to thwart police, but

instead were intended to provide practical reinforcement for the right against self-incrimination. The Court drew a distinction between the violation of the actual privilege itself, [i.e., the right to be free of torture, isolation, starvation, or assorted mental or physical pressure overbearing the suspect's will and thereby compelling incriminating statements] and the violation of a prophylactic safeguard created to preserve this privilege. If the underlying privilege is violated, a suspect's statements are *per se* inadmissible for any purpose. [See *Mincey v. Arizona*, \_\_\_\_ U.S. \_\_\_\_, 57 L. Ed. 2d 290, 98 S. Ct. 2408 (1978)] However, if merely the prophylactic guidelines are violated, then the Court will balance the interests of the suspect's constitutional Fifth Amendment right against the government's interests in protecting society from criminals. In assessing the government's interests, the Court will weigh the deterrent value of excluding the evidence in question to deter future unlawful police conduct against the strong interest of making available to the trier of fact all concededly relevant and trustworthy evidence. Mr. Justice Rehnquist indicated that the exclusionary rule concerning technical violations of *Miranda's* prophylactic guidelines only makes sense if it will deter police conduct which is willful or negligent or if the statements obtained are untrustworthy. The real significance of *Michigan v. Tucker* lies in the Court's rejection of a purely mechanical application of *Miranda's* exclusionary provisions for violation of the prophylactic guidelines enunciated in *Miranda* and in its willingness to look at the circumstances of the case in order to balance the interests of society and the criminal suspect. In *Michigan v. Tucker*, the Court struck the balance in favor of the government.

*Michigan v. Tucker* was decided shortly after *Harris v. New York*, 401 U.S. 222, 28, L. Ed. 2d 1, 91 S. Ct. 643 (1971), wherein the Court indicated that it would not expand *Miranda* beyond its specific holding. In *Harris*, the Court decided that although a criminal suspect has the right to be free from having statements which were elicited from him in violation of *Miranda* used against him by the prosecution in its case in chief [deterrent interest], a criminal defendant could not use the shield provided by *Miranda* as a license to commit perjury if the criminal defendant took the stand to testify falsely in his own defense [interest in preserving judicial integrity and making relevant and trustworthy evidence available to the trier of fact]. Therefore, the Court struck the balance in favor of allowing the prosecution to use otherwise impermissible statements [which were only technical *Miranda* violations] to impeach such a criminal defendant's testimony.

In *Michigan v. Mosley*, 423 U.S. 96, 46 L. Ed. 2d 313, 96 S. Ct. 321 (1975), the Court's decision turned on the interpretation of a single paragraph from the *Miranda* decision. Rejecting literal interpretations of the *Miranda* language that would lead to absurd and unintended results, the Court addressed *Miranda's* purpose of protecting criminal suspects' Fifth Amendment rights as balanced against the probability that a literal interpretation of *Miranda* would "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." [423 U.S. at 102] The Court once again balanced the interests of a criminal suspect's right to be free from compulsory self-incrimination against the interests of the State to

relevant and trustworthy evidence, holding that the criminal suspect's Fifth Amendment rights, upon re-questioning following an initial assertion of his right to silence, were not violated as long as he was not deprived of his right to cut off all present and future questioning by the police should he choose to do so.

The trend of the United States Supreme Court cases concerning interpretations of *Miranda* was clearly articulated by Mr. Justice Rehnquist, as Circuit Justice, in his order granting an application for a stay of enforcement of a California Supreme Court Judgment in *Fare v. Michael C.*, \_\_\_ U.S. \_\_\_, 58 L. Ed. 2d 19, 99 S. Ct. 3 (1978), as he commented that, "... this Court has been consistently reluctant to extend *Miranda* or to extend in any way its strictures on law enforcement agencies." [99 S.Ct. at 5] The Court simply will not create any extensions of *Miranda* which would "cut *Miranda* loose from its doctrinal moorings." [Id., at 5]

Keeping in mind the balance of interests surrounding the applicability of any extensions of *Miranda*, the underlying policy which serves as its doctrinal moorings bears examination. The *Miranda* Court stated that the constitutional foundation underlying the privilege against compulsory self-incrimination is the respect a government must accord to the dignity and integrity of its citizens. [384 U.S. at 460] The Court primarily focused on the right of the individual to be free from coercive tactics which overbear his will and compel him to incriminate himself. The analysis involves considerations of a

complex of values implicated in police questioning of a suspect in a custodial atmosphere. At one end of the continuum is the need for police questioning as a tool for the effective enforcement of criminal laws. At the other end is the societal belief that criminal law enforcement cannot be used as an instrument of coercion and unfairness. There is a fundamental tension between society's interest to be secure [effective law enforcement, judicial integrity, search for the truth, and punishment of criminals], and the individual's interest to be free from governmental intrusion which improperly overbears, coerces, and restrains liberty. The *Miranda* case attempted to strike the balance between security and liberty by creating rigid and precise prophylactic rules. To enforce this balance, an exclusionary rule was adopted. The rationale for the exclusionary rule was to deter police misconduct and protection of the courts from untrustworthy evidence. As Mr. Justice Rehnquist stated in *Michigan v. Tucker*, the pressures of law enforcement and the vagaries of human nature make it unrealistic to require policemen investigating serious crimes to make no errors whatsoever. Where the policeman's actions were pursued in complete good faith and he has not engaged in willful or negligent conduct, the deterrent rationale loses much of its force. In addition, if only technical violations of *Miranda* are involved, then there is little likelihood that the statements are untrustworthy. Considering society's interest in being secure from criminals, judicial integrity, and the fundamental fairness of punishing those guilty of serious crimes, the balance should shift in favor of not finding constitutional

infirmity when mere technical infractions of *Miranda* are involved. Furthermore, as the Court indicated in *Michigan v. Mosley*, the Court will look to *Miranda*'s underlying purposes and will not allow literal interpretations of passages in *Miranda* to lead to absurd and unintended results which could transform *Miranda* safeguards into wholly irrational obstacles to legitimate police activity. [423 U.S. at 102]

When considering the question of waiver of *Miranda* rights, a similar balancing of interests must be kept in mind. This Court has never held that a waiver of an individual's *Miranda* rights cannot be implied from the totality of the circumstances surrounding the giving of his statement. The suspect can easily protect his interest in preserving his Fifth Amendment rights by remaining silent or by telling the police officer that he does not desire to speak and/or by requesting to speak to an attorney prior to answering questions. On the other hand, no deterrent effect will be accomplished by excluding statements made voluntarily to police officers who take such statements after reasonably determining that the suspect has waived his rights under *Miranda* based upon the totality of the circumstances. To disallow the finding of an implied waiver under such circumstances would transform the procedural safeguards of *Miranda* into an irrational obstacle to legitimate police activity. Surely this is not what *Miranda* intended. An implied waiver is a fully effective equivalent of an express waiver as long as the facts warrant the conclusion that there was an implied waiver. This comports with society's interest in security

and judicial integrity. Furthermore, it allows the trier of fact to receive relevant trustworthy evidence and satisfies the societal interest that perpetrators of crime be punished. Balancing these interests leads to the conclusion that this Court should hold that a waiver of a criminal suspect's *Miranda* rights can be implied from the totality of circumstances.

### ARGUMENT V

IN SUBSEQUENT DECISIONS THIS COURT "HAS BEEN CONSISTENTLY RELUCTANT TO EXTEND *MIRANDA* OR TO EXTEND IN ANY WAY ITS STRICTURES ON LAW ENFORCEMENT AGENCIES."<sup>16</sup>

As noted by Mr. Justice Rehnquist in his *IN-CHAMBERS OPINION* staying enforcement of a judgment of the California Supreme Court adverse to the state which required exclusion of a juvenile's confession in *Fare v. Michael C.*, 21 Cal. 3rd 471 (1978), "some pattern has developed in the handling of *Miranda* issues. . . ."

The Justice goes on to say:

"*Miranda v. Arizona* was decided by a closely divided Court in 1966. While the rigidity of the prophylactic rules was a principal weakness in the view of dissenters

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<sup>16</sup>*Fare v. Michael C.*, \_\_\_ U.S. \_\_\_, \_\_\_, 58 L. Ed. 2d 19, 23, 99 S. Ct. 3, 5, (1978).

and critics outside the Court, its supporters saw that rigidity as the strength of the decision. It afforded police and courts clear guidance on the manner in which to conduct a custodial investigation: if it was rigid, it was also precise. But this core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely augmented by other courts under the guise of 'interpreting' *Miranda*, particularly if their decisions evinced no principled limitations. Sensitive to this tension, and to the substantial burden which the original *Miranda* rules have placed on local law enforcement efforts, this Court has been consistently reluctant to extend *Miranda* or to extend in any way its strictures on law enforcement agencies."

[*Fare v. Michael C.*, \_\_\_\_ U.S. \_\_\_\_, 58 L. Ed. 2d 19, 23, 99 S. Ct. 3, 5 (1978)]

Mr. Justice Rehnquist, in expressing concern that unrestrained lower court interpretation of *Miranda* "risks cutting *Miranda* loose from its doctrinal moorings," concludes that in the United States Supreme Court's subsequent cases "the overall thrust of these cases represents an effort to contain *Miranda* to, the express terms and logic of the original opinion."<sup>17</sup>

<sup>17</sup>*Fare v. Michael C.*, *Supra*, 58 L. Ed. 2d 19, 24, 99 S. Ct. 3, 5 (1978).

In *Harris v. New York*, 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971) the Court refused to extend *Miranda* to require a *per se* exclusion of a confession, taken without proper *Miranda* warnings but which was otherwise voluntary, used in cross examination to impeach the defendant's direct testimony. When the Oregon Supreme Court thereafter refused to accept the fine line of *Harris* and chose to extend *Miranda* violations as a total *per se* exclusion for any purpose in their jurisdiction beyond the perimeters of *Harris* and of this Court's desired intent, the Court reversed in *Oregon v. Hass*, 420 U.S. 714, 43 L. Ed. 2d 570, 95 S. Ct. 1215 (1975), making it clear that the United States Supreme Court will allow no further extension or expansion of *Miranda* beyond that which it deems appropriate. However, in *Mincey v. Arizona*, 437 U.S. \_\_\_\_, 57 L. Ed. 2d 290, 98 S. Ct. 2408 (1978) this Court made it clear that the *Harris* exception to *per se* exclusion arises only when a "*Miranda* violated" confession is otherwise voluntary.

In its *per curiam* opinion of *Oregon v. Mathiason*, 429 U.S. 492, 50 L. Ed. 2d 714, 97 S. Ct. 711 (1977) this Court declined the opportunity to extend the scope of *Miranda* to expand the concept of "custodial interrogation" broad enough to include a burglary suspect on parole who voluntarily came down to the police station at police request for questioning, who was not under arrest, and who was free to leave at any time and did in fact leave after making incriminating statements without the benefit of *Miranda* warnings. Reversing the Oregon Supreme Court's suppression of

such confession, the Court said: "We think that court has read *Miranda* too broadly, and we therefore reverse its judgment." This Court found that this interrogation was not "that sort of coercive environment to which *Miranda* by its terms was made applicable and to which it is limited."

In *Michigan v. Mosley*, 423 U.S. 96, 46 L. Ed. 2d 313, 96 S. Ct. 321 (1975) this Court refused to hold that, once rights are invoked, *Miranda* creates a *per se* proscription of indefinite duration precluding any subsequent opportunity to obtain a valid waiver and a voluntary statement.

In *Beckwith v. United States*, 425 U.S. 341, 48 L. Ed. 2d 1, 96 S. Ct. 1612 (1976) this Court did not see fit to extend *Miranda* warning requirements to IRS Agents questioning tax evasion suspects regarding federal income tax liability, even though the focus of any criminal investigation was directed entirely at the suspect being interrogated.

These decisions strongly echo the words of Justice Rehnquist that "the overall thrust of these cases represents an effort to contain *Miranda* to the express terms and logic of the original opinion."

## CONCLUSION

Upon the reasoning and authorities heretofore cited and discussed, the State of North Carolina respectfully submits that the Supreme Court of North Carolina erred in its interpretation of *Miranda v. Arizona* that the showing of a specific express oral or

written waiver of counsel is a mandatory prerequisite to the admissibility of any statement made by a suspect during in-custody interrogation, where such literate, adult suspect has been properly advised of his *Miranda* rights prior to questioning, has acknowledged that he understands such rights, has indicated he would "talk to you but I am not signing any form", has not been subjected to improper and unfair police activity or coercion, and has spoken freely and voluntarily in response to questions without requesting counsel or indicating in any manner that he wished to remain silent. Therefore, the decision of the North Carolina Supreme Court suppressing the respondent's confession on such basis, and the Court's order for a new trial, should be reversed and the conviction of this respondent should be affirmed. Respondent's conviction is free from any constitutional infirmity requiring a new trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I am Assistant Attorney General for the State of North Carolina; that I have served copies of the within BRIEF FOR THE PETITIONER by depositing copies of same in the United States mail at Washington, D.C., first class postage paid, addressed to:

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This 25th day of January, 1979

/s/ \_\_\_\_\_  
DONALD W. STEPHENS  
Assistant Attorney General

*COUNSEL FOR THE  
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